area.[123]

32. As a compromise, OneComm suggests allocating the upper 10 MHz block in two blocks, one a 6 MHz block (comprised of 120 contiguous channels), and the other a 4 MHz block (comprised of 80 contiguous channels).[124] OneComm's proposal is premised on a minimum CDMA block size of 62 channels (consisting of 50 channels of contiguous spectrum with six-channel guardbands on both sides).[125] In its reply comments, AMTA supports OneComm's proposal, noting that this proposal would reduce the transactional costs associated with relocation.[126]

33. In its initial comments, PCIA proposes spectrum blocks of ten channels licensed in a geographic area.[127] PCIA reasons that its channel allocation proposal would allow smaller entities to participate in wide-area licensing, minimize the need for frequency swaps and relocation on a large scale basis, and allow all 280 SMR channels to be made available for wide-area licensing.[128] Several reply commenters support PCIA's proposal on the grounds that it would: (1) provide growth potential for operators of smaller SMR systems;[129] (2) allow larger entities to apply only for those frequencies of true interest;[130] and (3) protect incumbents' rights while establishing a geographic area licensing mechanism.[131] In its *ex parte* comments, PCIA argues that the Commission should specify blocks of 60, 60, 60, and 20 channels.[132]

34. SMR WON proposes eligibility and licensing restrictions on certain wide-area spectrum blocks. In its initial comments, SMR WON recommends licensing 100 channels in two 50-channel blocks, and the remaining 100 channels in six 15-channel blocks and two 5-channel blocks. Under SMR WON's proposal, eligibility for three 15-channel blocks and one 5-channel block would be limited to certain designated entities, including small businesses.

---

[123]Pittencrief Reply Comments at 4.

[124]OneComm Comments at 13.

[125]*Id.*

[126]AMTA Reply Comments at 19.

[127]PCIA Comments at 13.

[128]*Id.*

[129]DCL Associates Reply Comments at 5.

[130]Fisher Reply Comments at 4.

[131]Joint Commenters Reply Comments at 15.

[132]PCIA *Ex Parte* Comments at 6.

For the other 15-channel blocks and the 5-channel block, eligibility would be restricted to existing operators providing SMR service in their respective license areas on June 20, 1994, the date Nextel originally proposed mandatory relocation for a portion of the 800 MHz SMR spectrum. SMR WON further proposes that Nextel and its affiliates, as well as cellular operators, should be ineligible for this "incumbent" block.[133] In its reply comments, SMR WON modified its proposal to suggest that only 100 channels, in two 50-channel blocks, be designated primarily for wide-area licensing. Under SMR WON's modified channel block proposal, the second 50-channel block would be segmented into five 10-channel blocks.[134] In its reply comments, Genesee supports SMR WON's modified channel block proposal.[135]

35. If the Commission implements its proposed three channel blocks, Nextel believes the twenty-channel block should be on Channels 401-420; the sixty-channel block on Channels 421-480; and the 120-channel block on Channels 481-600. This ensures that the smallest block is most proximate to smaller SMR providers operating on channels below 400.[136] Telecellular recommends that the EA spectrum block containing the largest number of channels -- and the largest number of incumbents -- be located closest to the lower eighty channels. Telecellular believes that the proximity to the lower 4 MHz of 800 MHz SMR spectrum will facilitate relocation.[137]

36. Discussion. We reject commenters' proposal to license a single 10 MHz wide-area license, because it would preclude opportunities for those smaller operators desiring geographic flexibility but not a large number of channels. In fact, we agree with the commenters who assert that viable, competitive wide-area systems can be established with less than 10 MHz of spectrum. We further believe that dividing the spectrum into multiple blocks would allow applicants to apply only for the spectrum they actually need. As a result, this approach would promote more efficient spectrum use by licensees and discourage spectrum warehousing. Thus, we conclude that dividing the upper 10 MHz block into multiple spectrum blocks is both feasible and desirable.

37. With respect to the specific size of the spectrum blocks, we are persuaded by the commenters who suggest that our initial proposal of four 2.5 MHz spectrum blocks could preclude the use of certain broadband technologies such as CDMA and GSM, which require larger spectrum blocks. Thus, we conclude that larger spectrum block sizes are needed. This conclusion, however, does not diminish our commitment to ensuring that operators of smaller SMR systems are provided meaningful opportunities to participate in wide-area licensing. We

---

[133]SMR WON Comments at 57.

[134]SMR WON Reply Comments at 9.

[135]Genesee Reply Comments at 2.

[136]Nextel *Ex Parte* Comments at 7-8.

[137]Telecellular *Ex Parte* Comments at 2.

also reject the proposal advanced by IC&E and CellCall to license two 5 MHz spectrum blocks. We believe that this alternative would not provide adequate opportunities for smaller entities. Moreover, we disagree with those commenters who propose spectrum blocks of 15-, 10-, and 5- channels. While we understand commenters' desire to create opportunities for smaller entities on the upper 10 MHz block, we nonetheless conclude that these spectrum blocks sizes are too small to permit a licensee to establish a viable and competitive wide-area system on a single spectrum block. In addition, we believe that the transactional costs associated with licensing these multiple small spectrum blocks ultimately would outweigh the benefits achieved by a wide-area licensing procedure. We further conclude that allocating varying size blocks will accomplish our goal of creating opportunities for wide-area SMR providers with differing spectrum needs. In addition, we conclude that such an approach would result in a total number of licenses that is administratively feasible for auction purposes. Thus, we will adopt an allocation plan which combines certain elements of OneComm's, AMTA's, and PCIA's proposals in an effort to balance equitably the interests of all potential and existing licensees. Under this allocation plan, we will allocate one 120-channel block, one 60-channel block, and one 20-channel block for licensing on an EA basis. The specific spectrum blocks are as follows:

Spectrum Block	Channel Numbers	Frequencies (Base and Mobile)
A	401-420	861.0125-861.4875 MHz 816.0125-816.4875 MHz
B	421-480	861.5125-862.9875 MHz 816.5125-817.9875 MHz
C	481-600	863.0125-865.9875 MHz 818.0125-820.9875 MHz

We believe that these channel block sizes will accommodate the spectrum needs of diverse SMR providers. We anticipate that the 120-channel block will be of most interest to the operators of larger SMR systems. In this connection, we believe that selecting the 120 channels closest to the cellular spectrum allocation would facilitate dual mode operation, which is of interest to some licensees seeking to provide wide-area service through use of a large number of channels. We also anticipate that the 60-channel block will be attractive to medium-sized SMR operators or a consortium of smaller SMR operators. Based on the record in this proceeding, we anticipate that operators of smaller SMR systems will be most interested in the 20-channel block. In this connection, the 20-channel block is the portion of the upper 10 MHz block nearest to the lower 4 MHz block so that smaller operators or relocated incumbents can expand system capacity while minimizing costs and disruption to existing customers. Thus, we expect that both large and smaller SMR licensees will be able to coexist in the upper 10 MHz block and will be afforded a meaningful opportunity to provide wide-area service.

4. 800 MHz SMR Spectrum Aggregation Limit

38. Background. In the *CMRS Third Report and Order*, we adopted a 45 MHz limit on aggregation of broadband PCS, cellular, and SMR spectrum. We concluded that this limitation, combined with existing service-specific caps for cellular and PCS, was sufficient to maintain a competitive CMRS market.[138] In light of this conclusion, in the *Further Notice*, we tentatively concluded that an additional aggregation limit within the 800 MHz SMR service was unnecessary.[139]

39. Comments. Several commenters agree with our proposal that a single entity should be permitted to acquire more than one spectrum block in a particular geographic area.[140] They support this arrangement because it would permit aggregation of spectrum for development of wide-area systems and allow flexibility to meet particular market conditions,[141] and would further our goal of promoting competition in the CMRS marketplace.[142] CellCall, Dru Jenkinson, *et al.*, OneComm, Telecellular, and AMI contend that an aggregation limit for the 800 MHz SMR service is unnecessary.[143] CellCall argues that restricting a single entity to less than the entire upper 10 MHz block of 800 MHz SMR spectrum would be inconsistent with the Commission's regulatory symmetry goals, since other CMRS providers are authorized a minimum of 10 MHz of spectrum.[144] Similarly, Telecellular argues that an individual spectrum aggregation cap for the 800 MHz SMR service is not needed, because even if a wide-area licensee acquired the total 280 SMR channels in a particular market, it still would have less spectrum than that held by cellular and most PCS licensees.[145]

---

[138]*CMRS Third Report and Order*, 9 FCC Rcd at 7999, ¶ 16.

[139]*Further Notice*, 10 FCC Rcd at 7985, ¶ 23.

[140]*See e.g.* AMTA Comments at 11; ABC Comments at 2-3; B&C Comments at 2-3; Bis-Man Comments at 2-3; Bolin Comments at 2-3; Dakota Comments at 2-3; Deck Comments at 2-3; Diamond "L" Comments at 2-3; E.T. Communications Co. Comments at 2-3; Keller Comments at 2-3; Nielson Comments at 2-3; Nodak Comments at 2-3; RCC Comments at 2-3; Raserco Comments at 2-3; Rayfield Comments at 2-3; SMCI Comments at 2-3; Vantek Comments at 2-3; CellCall Comments at 13; Dru Jenkinson, *et al.* Comments at 4; Morris Comments at 2; OneComm Comments at 24; Pittencrief Comments at 5-6; Southern Comments at 8,15; Telecellular Comments at 4; AMI Reply Comments at 2-3; UTC Reply Comments at 8; AMI *Ex Parte* Comments at 3; PCIA *Ex Parte* Comments at 6.

[141]AMTA Comments at 11.

[142]CellCall Comments at 13; Dru Jenkinson, *et al.* Comments at 5; AMI Reply Comments at 2-3.

[143]CellCall Comments at 13; Dru Jenkinson, *et al.* Comments at 4; OneComm Comments at 24; Telecellular Comments at 4; AMI Reply Comments at 3.

[144]CellCall Comments at 13.

[145]Telecellular Comments at 4.

40. Numerous commenters nonetheless advocate that a limit be placed on the amount of 800 MHz SMR spectrum that may be licensed to a single entity in any given market.[146] Some of these commenters support an aggregation limit because they believe that allowing a single entity to acquire the entire upper 10 MHz block would adversely affect competition.[147] SBA believes that a limit on aggregation of 800 MHz SMR spectrum is essential if an entrepreneurs' block is not established for the service, because the combined effect of no spectrum aggregation limit and no entrepreneurs' block may be that smaller SMR operators do not obtain any additional spectrum in the upper 10 MHz block.[148]

41. While several commenters agree that there should be an aggregation limit, they differ on how that limit should be defined. E.F. Johnson argues that consumers would be best served by a restriction that ensures more than two licensees in each service area, citing the lack of competition experienced in the cellular industry with only two licensees in each market.[149] Applied contends that there should be at least three licensees per market with each licensee limited to a total of 66 channels.[150] Other commenters argue that there should be a 7.5 MHz spectrum aggregation limit, consisting of three 50-channel blocks, which would permit at least two licensees per market.[151] Pittencrief contends that if a single entity is permitted to acquire the entire 14 MHz of 800 MHz SMR spectrum, provision of traditional SMR service would decrease.[152] Pittencrief suggests that the Commission could remove the aggregation limit, if appropriate, after five years.[153] Morris and UTC believe that one licensee

---

[146]American SMR Comments at 5-6; Applied Comments at 12; ABC Comments at 2-3; B&C Comments at 2-3; Bis-Man Comments at 2-3; Bolin Comments at 2-3; Dakota Comments at 2-3; Deck Comments at 2-3; Diamond "L" Comments at 2-3; E.T. Communications Comments at 2-3; Gulf Coast Comments at 1; Kay Comments at 4,6; Keller Comments at 2-3; Morris Comments at 2; Nielson Comments at 2-3; Nodak Comments at 2-3; Pittencrief Comments at 5-6; RCC Comments at 2-3; Raserco Comments at 2-3; Rayfield Comments at 2-3; Southern Comments at 2-3; SMCI Comments at 2-3; Total Com Comments at 5,7; SBA Comments at 25; UTC Reply Comments at 8; Vantek Comments at 2-3.

[147]American SMR Comments at 5-6; Pittencrief Comments at 5; Southern Comments at 8; Kay Reply Comments at 4,6.

[148]SBA Comments at 25.

[149]E.F. Johnson Comments at 6; E.F. Johnson Reply Comments at 5.

[150]Applied Comments at 12.

[151]ABC Comments at 2-3; B&C Comments at 2-3; Bis-Man Comments at 2-3; Bolin Comments at 2-3; Dakota Comments at 2-3; Deck Comments at 2-3; Diamond "L" Comments at 2-3; E.T. Communications Comments at 2-3; Keller Comments at 2-3; Nielson Comments at 2-3; Nodak Comments at 2-3; Pittencrief Comments at 5-6; RCC Comments at 2-3; Raserco Comments at 2-3; Rayfield Comments at 2-3; SMCI Comments at 2-3; Vantek Comments at 2-3.

[152]Pittencrief Comments at 6.

[153]*Id.*

should have no more than two 50-channel blocks.[154] Morris contends that such a limit would prevent spectrum warehousing and expedite delivery of new services to the public.[155] UTC contends that such a limit would ensure that consumers would have an array of services from which to select.[156] Gulf Coast contends that a single entity should be limited to a single 50-channel block in a particular market.[157] By contrast, Southern and Total Com propose spectrum caps for the 800 MHz SMR service.[158] Southern suggests a 140-channel limit, coupled with a limit that a single entity not be permitted to bid on more than two 50-channel blocks within a market, in order to preserve a competitive environment for all SMR licensees seeking to establish a wide-area system.[159] SBA proposes a 10 MHz spectrum cap in any particular market, in order to prevent monopolization.[160] Total Com advocates a 200-channel spectrum cap for the 800 MHz band, to allow for expansion by incumbents and entry by new entities with new technology.[161]

42. Discussion. In the *CMRS Third Report and Order*, we conducted an extensive market analysis of CMRS providers to determine how best to protect and encourage competition among mobile service providers.[162] We determined that all CMRS licensees -- including paging, SMR, PCS, and cellular -- are actual or potential competitors with one another, and therefore should be regarded as substantially similar for determining whether the statutory requirement for comparable technical rules applies.[163] One of the rationales for the 45 MHz CMRS spectrum aggregation limit is to prevent CMRS providers from restricting competition by aggregating spectrum.[164] In the *Further Notice*, we indicated our belief that additional limitations on aggregation of SMR spectrum were unnecessary to ensure a competitive CMRS market.[165]

---

[154]Morris Comments at 2; UTC Reply Comments at 8.

[155]Morris Comments at 2.

[156]UTC Reply Comments at 8.

[157]Gulf Coast Comments at 1.

[158]Southern Comments at 8; Total Com Comments at 5,7.

[159]Southern Comments at 8,14.

[160]SBA Comments at 25.

[161]Total Com Comments at 5,7.

[162]*CMRS Third Report and Order*, 9 FCC Rcd at 8009-8035, ¶¶ 37-77.

[163]*Id.* at 8012, ¶ 43.

[164]*See id.* at 8100, ¶ 238.

[165]*Further Notice*, 10 FCC Rcd at 7985, ¶ 23.

43. Given our analysis in the *CMRS Third Report and Order*, we conclude that allowing unrestricted aggregation of spectrum within the upper 10 MHz block would not impede CMRS competition. We reiterate our view that the 800 MHz SMR service is just one of many competitive services within the larger CMRS marketplace. For example, if a single licensee were to acquire all 10 MHz of wide-area licensed spectrum in a particular market, it would fall well short of the 45 MHz PCS/cellular/SMR spectrum cap. Moreover, as Telecellular notes, the licensee's aggregated spectrum holdings still would be significantly less than the amount of spectrum that may be aggregated by a cellular or broadband PCS licensee under our service-specific caps for those services. Additionally, if an 800 MHz SMR licensee neglects to respond to consumer demands, our flexible spectrum allocations and rules for other CMRS licensees (including cellular, PCS, and other SMR licensees) have created numerous competitors who can fill that vacuum by offering such services.

44. Moreover, we are concerned that limiting aggregation of 800 MHz SMR spectrum could handicap these potential competitors to broadband PCS and cellular providers with equal or larger spectrum holdings. Thus, we are not persuaded by commenters' arguments favoring a spectrum aggregation limit for the 800 MHz SMR service. We conclude, therefore, that SMR licensees will be permitted to seek and (if they are the high bidders for all EA licenses) obtain all three of the EA licenses in a market.[166] This approach will allow the marketplace to determine whether the 800 MHz SMR spectrum is most valuable on an aggregated or disaggregated basis. We reiterate, however, that even though we are not adopting a spectrum aggregation limit specific to the 800 MHz SMR service, such licensees remain subject to the 45 MHz CMRS spectrum aggregation limit[167] and to the competitive component of the public interest standard.[168]

5. Licensing in Mexican and Canadian Border Areas

45. Background. Our SMR allocations in the Mexican and Canadian border areas differ from the allocations in the rest of the nation. Specifically, in the Mexican border area,

---

[166]We note, however, that in the *Second Further Notice of Proposed Rule Making*, in PR Docket No. 93-144, we have proposed to increase the spectrum in the 800 MHz band designated for SMR use by an additional 3.75 MHz, consisting of the 150 Contiguous General Category channels. *See Second Further Notice of Proposed Rule Making, infra* ¶¶ 255-394. In light of the heavy congestion of these channels and our proposed special provisions for designated entities, we do not believe the availability of additional SMR spectrum and the amount thereof will alter our conclusions here.

[167]*See* 47 CFR § 20.6. Under Section 20.6 of the Commission's rules, an entity may hold up to 45 MHz of CMRS spectrum through a combination of broadband PCS, cellular, and SMR spectrum, provided that such holdings do not violate aggregation limits within these services.

[168]*See* 47 U.S.C. § 332(c)(1)(C). Under Section 332(c)(1)(C) of the Communications Act, as part of making a public interest determination regarding common carrier treatment of CMRS providers, the Commission "shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services." *Id.*

SMR channel availability is limited to 30 channels in the upper 10 MHz block, five channels in the remaining 4 MHz of 800 MHz SMR spectrum, and 60 additional channels reserved for SMR use in the border areas that are allocated to non-SMR services elsewhere. Moreover, these channels are offset 12.5 kHz below the corresponding SMR channels in non-border areas.[169] In the Canadian border area, SMR channel availability varies by region, with the majority of regions having between 55 and 120 channels in the upper 10 MHz block, none of the lower 80 channels, and some additional channels outside of either group.[170] In the *Further Notice*, we tentatively concluded that attempting to create different allocations in border areas would be administratively unworkable and, thus, proposed to license wide-area spectrum blocks on a uniform basis without distinguishing border from non-border areas.[171] We further proposed to license the channels in border areas not contained in the wide-area spectrum block on a channel-by-channel basis under the same rules we adopt for the lower 80 channels in non-border areas.[172]

46. Comments. Nextel and PCIA support the Commission's tentative conclusion that attempting to create different allocations in border areas would be administratively unworkable.[173] PCIA and Polar note that due to the different pool allocations and assignment of frequencies in the border areas, the Commission would have extreme difficulty in creating contiguous spectrum for such areas.[174] Pittencrief agrees with the Commission's licensing proposal for the Canadian and Mexican border areas.[175]

47. Other commenters suggest alternative channel assignment mechanisms for the border areas. AMI suggests that in the San Diego market, two wide-area blocks of 45 channels apiece with two of the 50 non-border area blocks would serve the unique needs of the market.[176] Genesee, AMI, PCIA, and Pittencrief contend that inter-category sharing should be permitted in the border areas in order to compensate for the severe shortage of 800 MHz SMR spectrum in these areas.[177] AMI further contends that inter-category sharing is

---

[169]*See* 47 CFR § 90.619(a).

[170]*Id.*, § 90.619(b).

[171]*Further Notice*, 10 FCC Rcd at 7988, ¶ 28.

[172]*Id.*, ¶ 29.

[173]Nextel Comments at 51-52; PCIA Comments at 11-12.

[174]PCIA Comments at 12; Polar Reply Comments at 5-6.

[175]Pittencrief Comments at 9.

[176]AMI Comments at 5.

[177]Genesee Comments at 2; AMI Comments at 5; AMI *Ex Parte* Comments at 11-15; PCIA *Ex Parte* Comments at 20; Pittencrief *Ex Parte* Comments at 2.

essential for growth of SMR systems in these areas because there are few available channels.[178] The Coalition urges the Commission to allocate a minimum of forty 800 MHz SMR channels for local use in all border areas.[179] Pittencrief also expresses concern about the availability of sufficient SMR spectrum to meet incumbents' expansion needs in the border areas. It suggests that in the border areas, one-third of the available 800 MHz SMR spectrum should be designated for wide-area licensing to permit two licensees, one with 40 percent of such available channels and the other with 60 percent of these channels. Pittencrief further suggests that the remaining channels would be available, on a percentage basis, in the same fashion as the 800 MHz SMR channels in other areas.[180] None of the commenters, however, addresses the issue of how to license channels in border areas that are not contained in the wide-area spectrum block.

48. Discussion. We conclude that the EA spectrum blocks should be licensed on a uniform basis, without distinguishing border from non-border areas. Thus, EA licensees will be entitled to use any available border area channels within their spectrum blocks, subject to international assignment and coordination of such channels. Although we recognize that some 800 MHz SMR channels will not be available in border areas, or may suffer from significant restrictions on power or antenna height, making them less attractive, we conclude that the alternative border area channel assignments proposed by the commenters are administratively infeasible. We believe that the limited channel availability and other operating restrictions in the border areas are matters to be assessed by EA applicants in their valuation of EA spectrum blocks for competitive bidding purposes. Thus, we conclude that it is unnecessary to establish a different wide-area spectrum block allocation for the border areas. Our decision does not preclude EA licensees from obtaining the rights to additional SMR spectrum in the border areas through private negotiation and agreement with other licensees. We will defer, however, the decision regarding treatment of 800 MHz SMR channels licensed in the border areas, but not included within the EA spectrum blocks, until the *Second Further Notice of Proposed Rule Making* in PR Docket No. 93-144.

B. Rights and Obligations of EA Licensees

1. Operational Flexibility

49. Background. In the *Further Notice*, we stated that a key element in any new licensing scheme for wide-area SMR systems is to afford licensees the same flexibility, to the extent feasible, as cellular and broadband PCS licensees in terms of the location, design, construction, and modification of their facilities throughout their service areas. We tentatively concluded that wide-area SMR licensees in the 800 MHz band should be authorized to

[178]AMI *Ex Parte* Comments at 7.

[179]Coalition Comments at 19-20.

[180]Pittencrief Reply Comments at 7.

construct stations at any available site and on any available channel within their respective spectrum blocks.[181] We also proposed to allow geographic area licensees to "self-coordinate" system modifications within their service areas -- that is, to add, remove, relocate, and otherwise modify individual base station facilities without prior Commission consent, provided they notify the Commission of the coordinates and certify compliance with our co-channel interference protection and emission mask requirements.[182]

50. Comments. The majority of commenters who addressed this issue support the Commission's proposal to allow geographic area licensees to self-coordinate system modifications.[183] AMTA and IC&E believe that self-coordination will help to alleviate the current disparities between 800 MHz SMR licensees and other CMRS providers.[184] CellCall believes that regulatory symmetry requires that geographic area licensees be permitted to self-coordinate their system modifications.[185] AMTA contends that self-coordination is largely illusory, since the wide-area licenses will be awarded in a heavily congested spectrum environment.[186] AMI suggests that any channels shared by a wide-area licensee and incumbents should be coordinated by a certified coordinator.[187] Dru Jenkinson, *et al.* suggests that incumbent co-channel licensees also should receive a copy of notice and certification of compliance regarding self-coordinated system modifications.[188] McCaw argues that if geographic area licensees are afforded operational flexibility comparable to that enjoyed by cellular operators, the geographic area licensees also should be subject to the same notice and record-keeping requirements applicable to cellular carriers.[189]

51. Other commenters are concerned that as a consequence of self-coordination by geographic area licensees, incumbents will be subjected to additional interference that will

---

[181] *Further Notice*, 10 FCC Rcd at 7988-7989, ¶ 30.

[182] *Id.* at 7989.

[183] AMI Comments at 9; AMTA Comments at 11-12; CellCall Comments at 15; Dru Jenkinson, *et al.* Comments at 6; IC&E Reply Comments at 6; McCaw Comments at 7; OneComm Comments at 24; Total Com Comments at 7.

[184] AMTA Comments at 11-12; IC&E Reply Comments at 6.

[185] CellCall Comments at 14-15.

[186] AMTA Comments at 13.

[187] AMI Comments at 9.

[188] Dru Jenkinson, *et al.* Comments at 7.

[189] McCaw Comments at 7.

continue for an extended period of time before incumbents can obtain some type of relief.[190] Southern observes that because SMR licensees already have considerable operational flexibility within their wide-area systems, there is no great benefit bestowed by the Commission's proposal.[191]

52. Discussion. We conclude that EA licensees on the upper 10 MHz block of 800 MHz SMR spectrum will be authorized to construct stations at any available site and on any available channel within their respective spectrum blocks. The EA license will allow the holder of the authorization to expand or modify facilities anywhere in its service area without prior Commission approval, so long as the system continues to comply with applicable technical and operational rules[192] and adequately protects incumbents. However, we will require EA licensees to notify the Commission of such changes. To fulfill this notification requirement, EA licensees must file an FCC Form 600 specifying the new technical parameters for the base stations that have been added, removed, relocated, or otherwise modified. Such filing will not require a filing fee if it is filed with the Commission within 30 days after their facilities are relocated. Given the substantial incumbent presence, we believe that this notification requirement is necessary to ensure the successful coexistence of EA licensees and incumbents in the upper 10 MHz block. Overall, these simplified procedures will reduce substantially the existing administrative burden on both SMR licensees and the Commission, and will establish greater consistency with our cellular licensing rules.

53. Although we recognize that an EA licensee's system modifications would be of interest to incumbent licensees operating within its spectrum block, we will encourage but not require the EA licensee to provide such incumbents with a copy of its notification to the Commission of system changes. We conclude that mandatory notification to other parties is unnecessary, because such system modifications will not reduce or eliminate the EA licensee's obligation to provide interference protection to incumbent licensees, as discussed *infra*. To the extent that an EA licensee's system modifications cause harmful interference to an incumbent, the affected incumbent will be able to seek redress under our rules to resolve such interference problems expeditiously.

2. Spectrum Management Rights -- Acquisition and Recovery of Channels Within Spectrum Blocks

54. Background. In the *Further Notice*, we recognized that the operational flexibility afforded to wide-area 800 MHz SMR licensees would be limited by the large number of

---

[190]Courtesy Comments at 1-2; Coalition Comments at 17.

[191]Southern Reply Comments at 14.

[192]These technical and operational requirements include, but are not limited to, ensuring that the EA licensee's operations do not have a significant effect on the environment, as defined in Part 1 of our Rules, and comply with applicable air safety requirements, as outlined in Part 17 of our Rules. *See* 47 C.F.R. § 1.1301 *et seq.* and 47 C.F.R. § 17.1 *et seq.*

systems already authorized and operating in the band, particularly in major markets. We noted that even if geographic area licensees do not immediately obtain clear spectrum comparable to our allocations for cellular or broadband PCS, wide-area licensing should confer other valuable rights that would enhance a licensee's ability to establish wide-area service. Thus, we proposed to assist geographic area licensees in consolidating spectrum within their respective blocks by providing that (1) if an incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission, the spectrum covered by the incumbent's authorization automatically reverts to the wide-area licensee; and, (2) if a wide-area licensee negotiates to acquire an incumbent system by assignment or transfer, the assignment or transfer presumptively will be considered in the public interest.[193]

55. Comments. AMI, AMTA, CellCall, and OneComm agree that spectrum recovered from an incumbent by the Commission automatically should revert to the wide-area licensee that obtained the rights to that spectrum.[194] AMI believes that this is a key incentive for seeking an EA spectrum block through competitive bidding.[195] AMTA believes that adoption of such a provision will prevent further fragmentation of the heavily congested 800 MHz SMR channels and allow licensees sufficient spectrum for extensive frequency reuse across their geographic areas.[196] CellCall believes that such a provision would provide the wide-area licensee with a useful right not otherwise available under the Commission's rules.[197] Additionally, Nextel argues that the Commission should eliminate its finder's preference program in the 800 MHz SMR service and dismiss all pending applications, in order to prevent any entity other than the EA licensee from getting recovered spectrum included in the EA spectrum block.[198]

56. On the other hand, Applied, Southern, and Total Com oppose automatically awarding recovered spectrum to geographic area licensees.[199] Applied believes that giving recovered channels to geographic area licensees automatically would unlawfully divest those persons on waiting lists for frequencies of their procedural rights.[200] Southern believes that such provision would foreclose any opportunity for other interested parties to apply for

---

[193] *Further Notice*, 10 FCC Rcd at 7989, ¶ 31.

[194] AMI Comments 6-7; AMTA Comments at 12; CellCall Comments at 16; OneComm Comments at 25.

[195] AMI Comments at 6-7.

[196] AMTA Comments at 12.

[197] CellCall Comments at 16.

[198] Nextel *Ex Parte* Comments at 14-15.

[199] Applied Comments at 17-18; Southern Comments at 16; Total Com Comments at 17.

[200] Applied Comments at 17-18.

unused channels, undermine our current finder's preference policy, and inhibit competition.[201]

57. Several commenters express support for the Commission's proposal that any request for transfer or assignment of an incumbent authorization to the EA licensee presumptively shall be considered in the public interest.[202] AMTA believes that such presumptive treatment is appropriate and may help to speed clearing those channels designated primarily for wide-area use.[203] Similarly, Dru Jenkinson, *et al.* believe that such a presumption will conserve scarce agency resources.[204] Although several commenters support including such a provision, some express concern that it not preclude incumbents from transferring or assigning their authorizations to parties other than the EA licensee.[205] Specifically, AMTA urges that incumbents' transfer or assignment of channels to a third party not be presumed to be contrary to the public interest.[206] In this connection, Southern urges the Commission to exercise abundant caution before prematurely approving a transfer of control or an assignment without making a determination regarding market concentration or the public interest.[207] Applied expressly opposes the Commission's proposal as violative of Section 310 of the Communications Act.[208]

58. Applied also argues that our proposal would not comply with Section 314 of the Communications Act.[209] Section 314 states, in pertinent part, that:

> [N]o person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system . . .

---

[201]Southern Comments at 16.

[202]AMI Comments at 7; AMTA Comments at 13; CellCall Comments at 16; Dru Jenkinson, *et al.* Comments at 8; Pittencrief Comments at 10.

[203]AMTA Comments at 13.

[204]Dru Jenkinson, *et al.* Comments at 8.

[205]AMI Comments at 7; AMTA Comments at 13; Fresno Comments at 7; Pittencrief Comments at 10.

[206]AMTA Comments at 13.

[207]Southern Comments at 17.

[208]Applied Comments at 11-12.

[209]*Id.*

> [if] the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce . . . or unlawfully to create monopoly in any line of commerce.[210]

Applied argues that a presumption that an EA licensee's acquisition of an incumbent's authorizations is in the public interest violates Section 314 because the Communications Act requires a case-by-case determination of the competitive effects of such an acquisition.[211]

59. Discussion. We conclude that spectrum within an EA licensee's spectrum block that is recovered by the Commission will revert automatically to the EA licensee, and we will generally consider transfers and assignments between an EA licensee and incumbents operating within its spectrum block presumptively to be in the public interest. We conclude that granting these rights to EA licensees will give them greater flexibility in managing their spectrum, establish greater consistency with our cellular and PCS rules, and reduce regulatory burdens on both licensees and the Commission with respect to future management of the spectrum within the wide-area blocks. As a direct consequence of our granting EA licenses which include these rights, we conclude that waiting lists, which are a by-product of channel-by-channel licensing, no longer would be useful. Thus, we hereby eliminate all waiting lists for SMR category channels within the upper 10 MHz block, because continuing such lists would be inconsistent with the wide-area licensing scheme we adopt today. In addition, all applications currently on waiting lists for frequencies that may become available in a geographic area are dismissed.

60. With respect to the impact of these rights on our finder's preference program, we conclude that successful applicants for a finder's preference will be considered an "incumbent" within the meaning of the rules adopted herein. In the *CMRS Third Report and Order*, we stated that the function of a finders' preference mechanism with respect to CMRS services will be addressed in a future rule making proceeding.[212] While the broad issue of finders' preferences will be addressed in that proceeding, we eliminate it immediately for the 800 MHz SMR service. Thus, the Commission no longer will accept finders' preference requests following the adoption of this *First Report and Order*. As a result, the EA licensee will have the exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.

61. With respect to Applied's arguments regarding Section 314 of the Communications Act, we believe that allowing EA licensees to acquire the facilities of incumbents operating within their spectrum block will in fact increase competition in the CMRS marketplace. In addition, we note that the CMRS market in general and not the 800

---

[210] 47 U.S.C. § 314.

[211] Applied Comments at 11-12.

[212] *CMRS Third Report and Order*, 9 FCC Rcd at 8162, ¶ 398.

MHz SMR service in particular is the relevant market for assessing the competitive impact in this context. Applied further argues that a certain number of licensees is needed in each market to keep it competitive.[213] We, however, have declined to adopt a spectrum aggregation limit for the 800 MHz SMR service (as discussed ¶ 42-44 *supra*).

62. With respect to the treatment of assignments and transfers between EA licensees and incumbents, we emphasize that under the approach we adopt today such assignments and transfers will be subject to a rebuttable presumption. Thus, any proposed assignments and transfers will undergo the review required under Sections 310 and 314 of the Communications Act.[214] As a result, we disagree with Applied's contention that our approach would violate the Communications Act, given that we would make an individualized assessment of the public interest benefits associated with each incumbent-to-EA licensee assignment or transfer as required by the Communications Act. Furthermore, we note that this rebuttable presumption would not preclude the filing of petitions to deny. In addition, as suggested by AMTA, we reiterate that such treatment will not preclude incumbents from transferring or assigning their authorizations to parties other than the EA licensee. Consequently, the fact that an incumbent proposes to assign or transfer its license to an entity other than the EA licensee alone will not constitute an adequate basis for a petition to deny against such transfer and assignment.

3. License Term and Renewal Expectancy

63. Background. In the *CMRS Third Report and Order*, we determined that every Part 90 licensee that is reclassified and treated as a CMRS licensee shall have a ten-year license term and be afforded a renewal expectancy when its current license term expires, provided it is able to demonstrate that it: (1) has provided "substantial" service[215] during the license term; and, (2) has complied with applicable Commission rules and policies, and the Communications Act.[216] We also determined that "grandfathered" Part 90 licensees, because they retain their "private" status until August 10, 1996, would not be afforded either the ten-year license term or the renewal expectancy during the statutory transition period.[217]

64. Discussion. Consistent with our decision in the *CMRS Third Report and Order*, EA licenses will have a term of ten years. In addition, EA licensees generally will be

---

[213]Applied Comments at 12.

[214]As discussed in ¶¶ 131-132 *infra*, on August 10, 1996, all EA licensees presumptively will be CMRS.

[215]We have defined "substantial" service as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. *See CMRS Third Report and Order*, 9 FCC Rcd at 8157, n. 712.

[216]*CMRS Third Report and Order*, 9 FCC Rcd at 8157, ¶ 386.

[217]*Id.* at 8157, n.715.

afforded a renewal expectancy as outlined above. We note, however, that some EA licensees may be "grandfathered" Part 90 licensees (that is, licensees who will retain their "private" status until August 10, 1996). Thus, we conclude that for those "grandfathered" Part 90 licensees who obtain EA licenses, only that service provided after the statutory transition period ending on August 10, 1996, will be considered in determining their renewal expectancy. We conclude that such treatment not only is appropriate but also fully consistent with our findings in the *CMRS Third Report and Order*.

4. Treatment of Incumbent Systems

a. Mandatory Relocation

65. Background. In the *Further Notice*, we sought comment regarding the potential effect of our wide-area licensing proposal on the operations of incumbent SMR licensees occupying the upper 10 MHz block. We tentatively concluded that incumbent SMR systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's band-clearing proposal.[218] We also expressed our concern that mandatory relocation could impose significant costs and disruption on incumbent licensees and their customers. Furthermore, we noted that relocation is likely to be complicated by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the wide-area blocks on a one-to-one basis, which could require us to become involved in decisions about which incumbents are required to relocate and which are not.[219]

66. We also expressed concern in the *Further Notice* that mandatory relocation would inevitably draw the Commission into disputes between licensees over substitutability of channels, compensable costs, and other related issues. As a result, we stated our preference for allowing geographic area licensees and incumbents to negotiate relocation, frequency swaps, mergers, purchases, or other arrangements on a voluntary basis, rather than mandating relocation. We noted that many licensees who currently are building wide-area SMR systems (and are likely to bid on wide-area licenses where such systems are located) previously have used such transactions to acquire consolidated blocks of frequencies. We further noted that we expected the process to continue, and, thus, we tentatively concluded that decisions regarding relocation should be left to the parties and the marketplace.[220]

---

[218]In the CMRS proceeding, Nextel proposed that existing SMR stations on the upper 10 MHz block would be required to "retune" their equipment to operate on other 800 MHz channels for which SMR licensees are eligible. Nextel further proposed that the cost of retuning would be paid by the wide-area licensee and that no licensee would be forced to move off its frequencies unless acceptable alternative frequencies were available. *See CMRS Third Report and Order*, 9 FCC Rcd at 8040-8041, ¶ 90 (citing Nextel Comments in PP Docket No. 93-252 at 11-12).

[219]*Further Notice*, 10 FCC Rcd at 7989-7991, ¶¶ 32-34.

[220]*Id.* at 7991, ¶¶ 34, 35.

67. In the *Further Notice*, we sought comment on the feasibility of using a mandatory relocation model similar to that adopted in the *Emerging Technologies* docket for microwave licensees. Under this approach, incumbents and geographic area licensees have a period of time to determine relocation issues on a voluntary basis (*e.g.*, one year). After the time has passed for voluntary negotiations, if such negotiations were unsuccessful, the wide-area licensee could request mandatory relocation, provided that sufficient spectrum is available and the incumbent receives comparable facilities.[221]

68. Comments. Most commenters oppose mandatory relocation pursuant to a band-clearing approach such as proposed by Nextel.[222] These commenters argue that: (1) there are no "fully comparable alternative frequencies" to which incumbents can be relocated;[223] (2) such an approach is anti-competitive, because the relocated incumbents will be competing with the geographic area licensees benefiting from such relocation;[224] (3) relocation would adversely affect incumbents' operations, with such consequences as disruption of customer

---

[221] *Further Notice*, 10 FCC Rcd at 7991-7992, ¶ 36.

[222] American Industrial Comments at 2; API Comments at 4; Applied Comments at 10; Atlantic Comments at 2-4; ABC Comments at 3; B&C Comments at 3; Bis-man Comments at 3; Bolin Comments at 3; Dakota Comments at 3; Deck Comments at 3; Diamond "L" Comments at 3; E.T. Communications Comments at 3; Keller Comments at 3; Morris Comments at 3; Nielson Comments at 3; Nodak Comments at 3; RCC Comments at 3; Raserco Comments at 3; Rayfield Comments at 3; SMCI Comments at 3; Vantek Comments at 3; Brandon Comments at 2; CellCall Comments at 23; Centennial Comments at 2-3; Chadmoore Comments at 24; CICS Comments at 4; Cumulous Comments at 11-12; Dial Call Comments at 3-4; Dru Jenkinson, *et al.* Comments at 7; Ericsson Comments at 6; Fisher Comments at 2; Genesee Comments at 5; Gulf Coast Comments at 2; Lagorio Comments at 5-9; Lausman Comments at 3; Luczak Comments at 6; Nashtel Comments at 4; Palmer Comments at 5; Parkinson Electronics, *et al.* Comments at 7-8; PCIA Comments at 10-11; Pittencrief Comments at 11; Coalition Comments at 12-13; SMR WON Comments at 38-40; Supreme Comments at 2; Sutter Comments at 1; Total Com Comments at 7; US Sugar Comments at 5; UTC Comments at 5; DCL Associates Reply Comments at 3; Eden Reply Comments at 5; Fresno Reply Comments at 6; IC&E Reply Comments at 7-8; Joint Commenters Reply Comments at 7-8; Kay Reply Comments at 1-2; Lachowicz Reply Comments at 1; Phipps Reply Comments at 3; Qualicom Reply Comments at 2; Racom, Inc., *et al.* Reply Comments at 12; Russ Miller Reply Comments at 9; Southern Reply Comments at 13-14; Triangle Reply Comments at 9-10; Voicelink Reply Comments at 1-2; D & G Communications *Ex Parte* Comments at 1; Galesburg *Ex Parte* Comments at 1; Jamestown *Ex Parte* Comments at 1; Pacific Gas *Ex Parte* Comments at 7; Joint Utilities *Ex Parte* Comments at 11-12; Louisville *Ex Parte* Comments at 9.

[223] Applied Comments at 10; Chadmoore Comments at 24; Cumulous Comments at 12; Dru Jenkinson, *et al.* Comments at 7; Ericsson Comments at 6; Lagorio Comments at 7; Coalition Comments at 13; SMR WON Comments at 42; Ericsson Reply Comments at 2; Kay Reply Comments at 1-2; Racom, Inc., *et al.* Reply Comments at 12; Supreme Reply Comments at 3; IC&E Reply Comments at 9; FedEx *Ex Parte* Comments at 2; Louisville *Ex Parte* Comments at 3-5, 7, 10, 13; Group of 66 *Ex Parte* Comments at 10; AI & ME *Ex Parte* Comments at 1-2; Earl *Ex Parte* Comments at 2; Fresno *Ex Parte* Comments at 10; US Sugar *Ex Parte* Comments at 1.

[224] Atlantic Comments at 2; Centennial Comments at 3; Galesburg ex parte Comments at 2; D & G Communications ex parte Comments at 1; C & S *Ex Parte* Comments at 2; Communications Center *Ex Parte* Comments at 2; Sea Coast *Ex Parte* Comments at 1.

service and loss of customer confidence and goodwill;[225] (4) relocation lacks an adequate policy basis, given its resulting disruption to existing operations;[226] (5) relocation would be unfair and inequitable to incumbents; [227] and, (6) relocation would decrease the value of incumbent systems.[228] AMTA notes that with few exceptions, traditional SMR operators strongly oppose such an approach, and, instead recommend continued reliance on market forces to define the future SMR landscape.[229]

69. Nextel and Spectrum, on the other hand, support a band-clearing mandatory relocation approach.[230] Nextel believes that mandatory retuning of incumbents from the upper 10 MHz block is statutorily mandated and required by the public interest because it is essential to regulatory symmetry.[231] Nextel further believes that such wide-scale retuning is feasible.[232] Spectrum believes that without mandatory relocation of incumbents, the newly created wide-area licenses would not provide existing licensees relief from the current licensing process, and that geographic area licensees would be unable to introduce advanced technologies in the 800 MHz SMR service to compete with other CMRS licensees.[233] AMTA notes that certain existing wide-area applicants and licensees argue that the long-term

---

[225]Brandon Comments at 3; CellCall Comments at 23; Centennial Comments at 3; Fisher Comments at 2; Genesee Comments at 3; Luczak Comments at 6-7; Nashtel Comments at 4; CICS Reply Comments at 2; DCL Associates Reply Comments at 3; Ericsson Reply Comments at 2; Joint Commenters Reply Comments at 7-8; Lachowicz Reply Comments at 1; Luczak Reply Comments at 4-5; Qualicom Reply Comments at 2; PEC Mobile *Ex Parte* Comments at 2; Joint Utilities *Ex Parte* Comments at 12; Louisville *Ex Parte* Comments at 5, 10; Group of 66 *Ex Parte* Comments at 7; AI & ME *Ex Parte* Comments at 1-2; Bolin *Ex Parte* Comments at 1; C & S *Ex Parte* Comments at 1; CellCall *Ex Parte* Comments at 2; RACOM *Ex Parte* Comments at 4, 6; RCS *Ex Parte* Comments at 1-2; Sea Coast *Ex Parte* Comments at 1; Southern *Ex Parte* Comments at 7-9; Spectrum *Ex Parte* Comments at 1.

[226]CICS Comments at 4; Brandon Comments at 2.

[227]Brandon Comments at 2; CellCall Comments at 23; Chadmoore Comments at 24-25; Cumulous Comments at 11; Ericsson Comments at 6; Lausman Comments at 3; US Sugar Comments at 5; Fisher Reply Comments at 7; PCIA Reply Comments at 19; Southern Reply Comments at 31; D & G Communications *Ex Parte* Comments at 1; PEC Mobile *Ex Parte* Comments at 1; FedEx *Ex Parte* Comments at 1-2; Jamestown *Ex Parte* Comments at 1; Galesburg *Ex Parte* Comments at 1; Groups of 66 *Ex Parte* Comments at 5; ABC *Ex Parte* Comments at 1; Lectro *Ex Parte* Comments at 1.

[228]Parkinson Electronics, *et al.* Comments at 8; PCIA Comments at 11; SMR WON Comments at 38-40; Triangle Reply Comments at 10.

[229]AMTA Comments at 17.

[230]Nextel Comments at 27; Spectrum Reply Comments at 1-3.

[231]Nextel Reply Comments at 29.

[232]Nextel Comments at 38-40.

[233]Spectrum Reply Comments at 1-3.

economic viability of wide-area systems requires clear, contiguous spectrum which can support the more spectrally efficient technologies currently under development.[234]

70. As a general matter, numerous commenters believe that decisions regarding relocation should be left to the parties and the marketplace.[235] CellCall believes that voluntary relocation of incumbent licensees provides the most flexible, efficient, and equitable means to obtain contiguous spectrum and to promote the use of efficient wireless technologies.[236] CellCall contends that frequency swaps between upper band and lower band licensees should be permitted.[237] In fact, several commenters argue that the Commission should not become involved in negotiations between geographic area licensees and incumbents regarding relocation.[238]

71. Other commenters argue that voluntary measures alone will not result in the relocation of a sufficient number of incumbents sufficient to implement our wide-area licensing proposal. Nextel contends that mandatory retuning will be necessary because no amount of voluntary negotiation alone will result in contiguous spectrum for the geographic area licensees due to the large number of existing SMR licensees. Nextel argues that purely voluntary retuning only will encourage greenmail and engender delay in achieving licensing symmetry between 800 MHz SMR licensees and other CMRS providers.[239] OneComm contends that if the Commission's proposal is implemented it would perpetuate the existing fragmented nature of SMR spectrum. OneComm, based on its experience, argues that reliance on market forces alone is insufficient to assemble contiguous spectrum. OneComm believes that Commission's proposal could provide an even stronger economic incentive for incumbent licensees to hold out and demand above-market prices.[240] AMTA is convinced that without some form of mandatory negotiation among the parties, creation of contiguous spectrum for

---

[234]AMTA Comments at 18.

[235]AMTA Comments at 19-20; Atlantic Comments at 2; ABC Comments at 3; B&C Comments at 3; Dakota Comments at 3; Deck Comments at 3; Diamond "L" Comments at 3; E.T. Communications Comments at 3; Keller Comments at 3; Morris Comments at 3; Nielson Comments at 3; Nodak Comments at 3; RCC Comments at 3; Raserco Comments at 3; Rayfield Comments at 3; SMCI Comments at 3; Vantek Comments at 3; CICS Comments at 5; Dial Call Comments at 6; Genesee Comments at 3; Palmer Comments at 5; Pittencrief Comments at 11; SMR WON Comments at 41; UTC Comments at 5; Fisher Reply Comments at 7; CellCall Reply Comments at 15; IC&E Reply Comments at 7-8.

[236]CellCall Reply Comments at 10.

[237]CellCall Comments at 14.

[238]American Industrial Comments at 2; Applied Comments at 9-10; Ericsson Comments at 7; SBA Comments at 26-27.

[239]Nextel Comments at 32.

[240]OneComm Comments at 18-19.

wide-area licensing would not be accomplished.[241] Dial Call believes that voluntary negotiations alone are insufficient inducements.[242] ITA/Alliance believe that voluntary retuning provisions will not be sufficient to create regulatory parity.[243] Spectrum opines that voluntary negotiations are insufficient to clear the upper 10 MHz block.[244]

72. With respect to particular mandatory relocation schemes, the commenters propose a variety of alternatives. Nextel advocates requiring all incumbent licensees on the upper 10 MHz block to relocate within a defined window (*e.g.*, one year), provided that alternative spectrum is available and the wide-area licensee pays for the full cost of relocation.[245] AMTA and OneComm suggest a mechanism where mandatory relocation is triggered by partial band clearing on a voluntary basis. Under this proposal, a wide-area licensee would be required to relocate or otherwise clear a percentage of incumbents (*e.g.*, 70 percent) off its spectrum block through voluntary negotiations. Once this threshold is reached, the wide-area licensee then could require remaining incumbents to relocate, provided that sufficient spectrum is available and the incumbent is fully compensated.[246] In its initial comments, Motorola advocated deferring the decision on whether to employ mandatory relocation until the Commission could ascertain the effectiveness of voluntary negotiations. Under this approach, the Commission would revisit the issue of mandatory relocation in a subsequent proceeding after a defined period (*e.g.*, one year).[247] Another proposal, which was suggested by SMR WON, is that all incumbents are relocated from the upper 10 MHz block to the General Category channels with relocation expenses paid by the geographic area licensees benefitting from such relocation.[248]

73. Discussion. Though we continue to believe that voluntary negotiations and marketplace incentives are important, based on the record in this proceeding, we conclude that a smooth and equitable transition to the new licensing framework we adopt today for the 800 MHz SMR service cannot be accomplished without some form of mandatory relocation as part of the relocation mechanism. The record supports our conclusion that voluntary negotiations in and of themselves will not be adequate to usher in the wide-area licensing

---

[241]AMTA Reply Comments at 10.

[242]Dial Call Reply Comments at 8.

[243]ITA/Alliance Reply Comments at 12.

[244]Spectrum Reply Comments at 3-4.

[245]Nextel Comments at 33.

[246]AMTA Reply Comments at 22-25; OneComm Comments at 10-11.

[247]Motorola Comments at 17.

[248]SMR WON Comments at 44-45.

approach we are implementing for the 800 MHz SMR service.[249] Based on our experience in the broadband PCS context, we believe it is necessary for the Commission to define the broad parameters under which such negotiations are to take place, and to establish a mandatory mechanism for those situations where relocation is feasible but voluntary negotiations have proved unsuccessful.[250] Thus, despite the difficulties we noted in the *Further Notice* pertaining to mandatory relocation in the 800 MHz SMR context (such as scarcity of vacant channels, the potential for service disruption, and potential significant costs), we conclude that a narrowly-tailored mandatory relocation mechanism is essential to implement a wide-area licensing scheme in the mature 800 MHz SMR industry.

74. We believe such a relocation scheme must be narrowly tailored in order to prevent adverse impact on the operations of existing licensees. Therefore, we emphasize two key tenets of our relocation scheme: (1) if an EA licensee is either unable or unwilling to provide an incumbent licensee with "comparable facilities" (as discussed in the *Second Further Notice of Proposed Rule Making, infra*), such incumbent would not be subject to mandatory relocation; and, (2) any incumbent that is relocated from frequencies within the upper 10 MHz block, either voluntarily or involuntarily, will not be required to relocate again if we adopt our geographic area licensing proposal for the lower 80 and General Category channels (*see Second Further Notice of Proposed Rule Making, infra*). We believe that these measures are necessary to protect the operational interests of incumbent licensees who relocate off of the upper 10 MHz block. We also believe that these protections are essential for such incumbents to be able to engage in effective business planning.

75. Prior to the upper 10 MHz block auction and commencement of the mandatory relocation scheme, we encourage potential EA applicants to enter into negotiations with incumbents. To facilitate such negotiations we are taking certain administrative actions. On October 4, 1995, the Bureau imposed a freeze on the filing of new applications for the General Category channels.[251] As discussed in further detail, *infra*, we are designating the General Category channels for exclusive SMR use. Under both the Commission-imposed freeze on the 800 MHz SMR Category channels and the Bureau-imposed freeze on the General Category channels, assignment and transfer of control applications continue to be processed when the location of the licensed facilities remains unchanged. By today's action, we are initiating a partial lifting of the freeze on new applications for SMR and General Category channels to permit those assignments and transfers of control that involve

---

[249]*See e.g.* Nextel Comments at 31, 32; OneComm Comments at 8, 18-19; AMTA Reply Comments at 10; Dial Call Reply Comments at 8; ITA/Alliance Reply Comments at 12; Spectrum Reply Comments 3.

[250]*See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589.

[251]*See* Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands, DA 95-2119, *Order*, released October 4, 1995.

modifications to licensed facilities, provided such assignments and transfers are designed to accommodate market-driven, voluntary relocation arrangements between incumbents and potential EA applicants, and do not change the 22 dBu service contour of the facilities to be relocated.

76. We reiterate that this option is solely available for licensees being relocated out of the upper 10 MHz block. We will not accept applications to relocate incumbents from one part of the upper 10 MHz block to another. To allow such relocations within the 10 MHz block prior to the auction could result in one EA applicant increasing the number of incumbent licensees on another spectrum block for which a competitor may apply. We also will require that the potential EA applicant and relocating incumbent(s) be completely unaffiliated. As a safeguard against abuse of the market-driven relocation option, we will require certifications from the assignor and assignee or transferor and transferee that (1) the transaction is part of a relocation arrangement negotiated and agreed upon by the parties, and (2) that the parties are not now, and have never been affiliates of one another. For purposes of this option, we will define an "affiliate" as an individual or entity who (1) directly or indirectly controls or has the power to control a party to the application, (2) is directly or indirectly controlled by a party to the application, (3) is directly or indirectly controlled by a third party or parties that also controls or has the power to control a party to the application, or (4) has an "identity of interest" with a party to the application. Processing of these assignments and transfers will continue until the date we release the Public Notice announcing the upper 10 MHz block auction. By this action, we are providing a means for a purely voluntary period before the mandatory relocation procedures are applicable to incumbent licensees. As evidenced by the record in this proceeding, numerous commenters support a relocation mechanism which operates on a purely voluntary basis. Thus, we believe that this partial lifting of both freezes imposed on these frequencies will facilitate a smooth transition to our new wide-area licensing scheme for the upper 10 MHz block by allowing existing licensees to begin the relocation process quickly. As of the adoption of this *First Report and Order*, we will not except new requests filed pursuant to the showing described in the *CMRS Third Report and Order*.[252]

77. In addition to encouraging pre-auction negotiation, we adopt the following relocation mechanism, that will go into effect post-auction. This mechanism will consist of two phases before an EA licensee may proceed to request involuntary relocation of an incumbent. The first phase is a one-year period for voluntary negotiations. During this voluntary period, the EA licensee and incumbents may negotiate any mutually agreeable relocation agreement. Because negotiations are strictly voluntary and are not defined by any parameters, an EA licensee may choose to offer premium payments or superior facilities as an incentive to the incumbent to relocate quickly. We delegate to the Bureau the authority to announce the commencement of this first phase by issuance of a Public Notice. We anticipate that this first phase will commence shortly after all EA licenses are granted.

---

[252]*CMRS Third Report and Order*, 9 FCC Rcd 8047-8048, ¶ 108.

78. For incumbents to be treated fairly under our relocation mechanism, they need information and certainty about the EA licensees' relocation plans, and must receive this information as soon as possible. Incumbents need to factor such relocation into their respective business plans. Thus, we will require EA licensees to notify incumbents operating on frequencies included in their spectrum block of their intention to relocate such incumbents within 90 days of the release of the Public Notice commencing the voluntary negotiation period. If an incumbent does not receive timely notification of relocation, the EA licensee loses the right to require that incumbent to relocate. Because such notification affects an EA licensee's relocation rights, we will require that the EA licensee files a copy of the relocation notice and proof of the incumbent's receipt of the notice within ten days of such receipt. An EA licensee's failure to file such information with the Commission creates a presumption that the incumbent has not been notified of intended relocation. The incumbent licensee who has been notified of intended relocation will be able to require that all EA licensees negotiate with such licensee together. We believe that these requirements will ensure that incumbents are timely notified of possible relocation and that such relocation will occur on a system-wide rather than piecemeal basis. In addition, requiring all EA licensees that intend to relocate an incumbent to negotiate together provides a simple mechanism for sharing the costs of relocating an incumbents' entire system among all affected EA licensees.

79. If no agreement is reached between the EA licensee and incumbents during the first phase, the EA licensee may initiate a two-year mandatory negotiation period, during which the parties are required to negotiate in "good faith." In the event that the parties still fail to reach an agreement during this second phase, the EA licensee may request involuntary relocation of the incumbent's system. In such a case, the EA licensee must: (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; (2) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and, (3) build and test the new system. Specifically, any relocation of an incumbent must be conducted in such a fashion that there is a "seamless" transition from the incumbents "old" frequency to its "relocated" frequency (that is, there is no significant disruption in the incumbent's operations). We recognize that this "seamless" transition obligation on the part of the EA licensee may require that a relocated incumbents' old system and its new post-relocation system operate simultaneously for a period in order to avoid significant service disruption. We believe this is an appropriate obligation to impose on the EA licensee, however, if no alternative means exists to carry out a seamless transition. Although this may be the most effective way of minimizing significant disruption to the incumbent's operations, we will not require EA licensees to conduct their incumbent relocations in this manner in every instance. We caution EA licensees, however, that if this is the only way in which they reasonably can ensure avoidance of significant service disruption to the incumbent we will not look favorably upon their decision not to employ this relocation approach. Similar to our approach in the broadband PCS context, we seek comment in the *Second Further Notice of Proposed Rule Making* in PR Docket No. 93-144 on how responsibilities for relocation should be shared by all EA licensees benefitting from relocation of the same incumbents and the definition of "comparable facilities."

b. Incumbent Operational Flexibility

80. Background. In the *Further Notice*, we tentatively concluded that in those situations in which incumbents continue operating on already-licensed facilities, they should not be allowed to expand beyond their existing service areas on those channels designated for wide-area licensing without the consent of the wide-area licensee.[253] We also noted that although we traditionally have applied the protected service area concept to non-cellular Part 22 services, we have not yet incorporated this concept into our Part 90 rules. We asked commenters to address whether we should enable incumbent systems operating on the upper 10 MHz block to construct stations anywhere within a defined protected service area.[254]

81. Comments. CellCall and OneComm agree with our proposal to allow incumbents to expand beyond their existing service areas on channels included in the EA licensee's spectrum block only with the consent of the EA licensee.[255] Several commenters, however, express concern that such an approach could affect adversely incumbents' operations because: (1) the expansion and operating potential of incumbent licensees would be limited;[256] and, (2) the EA licensee's consent to incumbent expansion is not likely to be given, since it has every incentive to expand its own operations as quickly as possible.[257] SBA and DCL Associates believe wide operational flexibility should be extended to all SMR licensees, whether they are wide-area or local licensees.[258]

82. Some commenters suggest different scenarios under which incumbents should be permitted to expand their service area without first obtaining the EA licensee's consent. For example, several commenters recommend that the 40/22 dBu co-channel separation standard could be reduced in favor of incumbents within an EA licensee's coverage area, unless the EA licensee already had constructed co-channel facilities at a particular site.[259] Similarly,

---

[253] *Further Notice*, 10 FCC Rcd at 7992, ¶ 37.

[254] *Id.* at 7993, ¶ 40.

[255] CellCall Comments at 24; OneComm Comments at 25.

[256] Applied Comments at 13-14; CUI Comments at 7; CICS Comments at 3; Ericsson Comments at 4; Southern Comments at 18; Total Comments at 8; *see also* D & G Communications *Ex Parte* Comments at 1; Galesburg *Ex Parte* Comments at 1.

[257] Ericsson Comments at 4; Southern Comments at 18.

[258] SBA Comments at 29; DCL Associates Reply Comments at 7.

[259] ABC Comments at 4; B&C Comments at 4; Bis-Man Comments at 4; Bolin Comments at 4; Brandon Comments at 2; Dakota Comments at 4; Deck Comments at 4; Diamond "L" Comments at 4; E.T. Communications Comments at 4; Keller Comments at 4; Morris Comments at 4; Nielson Comments at 4; Nodak Comments at 4; RCC Comments at 4; Raserco Comments at 4; Rayfield Comments at 4; SMCI Comments at 4; Vantek Comments at 4.

Coalition proposes that where an upper block channel has remained available for 120 days or more, or where it is possible to extend service contours of an existing station into a presently unserved area without interfering with any operations of the wide-area licensee, incumbent licensees should be expressly permitted to file applications requesting expansion of their facilities. Coalition further proposes that incumbents discovering substantive construction and operational violations should continue to be able to request and obtain dispositive finder's preferences for bringing these violations to the Commission's attention.[260] CellCall proposes that if an EA licensee withholds its consent, that licensee should be required to construct the requested channels within six months. If the EA licensee fails to complete such construction, the channel would become available to the incumbent upon a showing of need for inclusion of the channel in a geographic area. CellCall contends that such a mechanism will provide a measure of flexibility to incumbents with expansion needs, thereby putting channels to use promptly and efficiently.[261] Telecellular requests the Commission to adopt a rule permitting incumbent licensees to file for new base stations when the incumbent can demonstrate that, based on interference protection requirements, the wide-area licensee could not construct a transmitter at the new site and that the new site would not materially extend the interference protection contour afforded the incumbent.[262]

83. With respect to the operational flexibility that should be afforded to incumbents, several commenters argue that incumbent licensees should be permitted to relocate their facilities so long as they do not alter their 22 dBu contour.[263] They contend that incumbents should be allowed: (1) to make minor system modifications, such as moving a transmitter because of loss of site or other site-related problems;[264] or, (2) to establish new fill-in stations in certain limited circumstances (*e.g.*, no expansion of the 40 dBu contour, or no expansion of the 22 dBu contour).[265] They further argue that granting this operational flexibility to

---

[260]Coalition Comments at 16.

[261]CellCall Comments at 24.

[262]Telecellular Comments at 8.

[263]ABC Comments at 4; B&C Comments at 4; Bis-Man Comments at 4; Bolin Comments at 4; Brandon Comments at 2; Dakota Comments at 4; Deck Comments at 4; Diamond "L" Comments at 4; E.T. Communications Comments at 4; Keller Comments at 4; Morris Comments at 3; Nielson Comments at 4; Nodak Comments at 4; RCC Comments at 4; Raserco Comments at 4; Rayfield Comments at 4; SMCI Comments at 4; Vantek Comments at 4; AMI *Ex Parte* Comments at 3-4; AMTA *Ex Parte* Comments at 2, Supp.1; PCIA *Ex Parte* Comments at 6-7; Pittencrief *Ex Parte* Comments at 2-3; Small Business SMR *Ex Parte* Comments at 8; Southern *Ex Parte* Comments at 13.

[264]CellCall Comments at 24; Fisher Comments at 3; Pittencrief Comments at 12; Fisher Reply Comments at 9.

[265]Motorola Comments at 20; OneComm Comments at 25; Nextel Comments at 34; Dial Call Reply Comments at 11; Telecellular Reply Comments at 2-3; *see also* PEC Mobile *Ex Parte* Comments at 2; Russ Miller *Ex Parte* Comments at 2; Southern *Ex Parte* Comments at 10-11.